

should be asked to consider again that question or questions related closely to it.

I think that it does fall in a category for that reason of concern as opposed to those cases where we are not hearing that kind of an approach.

Senator EAST. Mrs. O'Connor, on that point, every fundamental constitutional question is never fully resolved; it is always recurring, in whatever field it is. I see what you are saying, and I respect your judgment on it. I just respectfully disagree in that questions are always recurring, being reexamined, and redefined.

I do not see anything that is unique about this one as opposed to the others because they too shall be coming back, and I suspect this one will be coming back for an indefinite period of time.

But, again, I thank you for your courtesy and responsiveness.

Mr. Chairman, I have run out my time.

The CHAIRMAN. The distinguished Senator from Montana, Mr. Baucus.

Senator BAUCUS. Thank you, Mr. Chairman.

Judge O'Connor, I think it would be helpful if we pursued the same issue a little further.

It is my understanding that subsequent to the *McCardle* case the *Kline* case was decided which held that the Congress cannot limit Supreme Court jurisdiction in order to achieve a certain result.

Not only are there various constitutional scholars who come down on different sides, but the case law here is a bit confused, too. Is that not the case?

Judge O'CONNOR. Senator Baucus, you are correct. I think approximately 4 years after ex parte *McCardle* we had the case in 1872 of *United States v. Kline*.

I believe—I am not certain—that case involved a removal of jurisdiction at a lower Federal court level and was not directly related to the appellate jurisdiction of the U.S. Supreme Court. I could be wrong, but that is my recollection.

The case involved a matter which was then pending involving a litigant in the lower Federal court who had obtained a Presidential pardon for disloyalty in the Civil War, and he had a claim which was being made which he was entitled to make based on the Presidential pardon.

The Congress passed a law which in effect directed the court to dismiss the lawsuit of any person who had obtained a Presidential pardon for disloyalty in the Civil War. It was directed of course at that precise lawsuit, and the Supreme Court did hold that that action by Congress, which was directed toward resolving a particular case, was invalid.

Senator BAUCUS. Yesterday when we discussed this same issue I asked you as a matter of public policy how far you felt Congress should go in limiting Supreme Court review of constitutional questions. You appropriately did not give a definitive answer to that question.

Nevertheless, I was left with the impression that you had certain problems with limiting Supreme Court jurisdiction because you cited a vote that you had cast in the Arizona Senate on a related issue.

I would like to quote from the minutes of the Arizona State Senate, which quote you, after your vote in opposition to Senate Memorial No. 1. This was on February 25, 1970. It substantiates the point you made to me yesterday.

I quote—this is you:

The issue is whether we want to advocate stripping the supreme court of jurisdiction over certain matters because we disagree with some of its decisions. I too disagree with certain United States Supreme Court decisions in the field of pornography and obscenity, but I cannot advocate limiting the Court's appellate jurisdiction. Once we start such a procedure, where do we stop?

My question is whether you still subscribe to that view.

Judge O'CONNOR. Senator Baucus, I was of course speaking as a legislator in 1970, and I do not want to be put in the position of suggesting to other legislators how they should view the situation today.

But that certainly was my expression at that time in regard to the proposal that was before us. I do not think that I would have retreated from that position thereafter as a legislator.

#### SPECIALTY COURTS

Senator BAUCUS. Turning to another area, because our country is getting more complex, some have suggested that we create specialty courts, particularly specialty courts of appeal—a tax court of appeals for example; some have suggested an environmental court of appeals.

My question to you is what is your general view of the degree to which Congress should set up specialty courts of appeals as opposed to letting the circuit courts of appeals and the Supreme Court handle complicated and arcane issues as generalist judges.

Judge O'CONNOR. Senator Baucus, Senator DeConcini was really addressing some of the same questions with me this afternoon.

I do not know that I have a clear picture in my own mind of precisely how such courts would work. I think the Congress is now in a position to evaluate the bankruptcy court structure that it has established—and that certainly is a specialty court in a sense—and can determine whether the enhanced jurisdiction that has been given to that bankruptcy court will work well in that specialized area. If it does and if people generally are satisfied, then perhaps it can be considered in some other areas.

Senator BAUCUS. I am wondering though, as an appellate court judge, what guidance you might give us. Do you think it is good public policy to move in the direction of setting up specialized courts; or is it better public policy for appellate court judges as generalists to hear cases arising from different directions?

Judge O'CONNOR. Senator Baucus, as an appellate court judge, I have personally valued the opportunity to deal with a wide range of cases and issues. I have been happier in my work, if you will, just as a personal matter, to have the opportunity to deal with a broader range of issues.

What we really want to know is what best serves the public generally—what is going to make the court system work best and not what pleases the appellate court judges.

Senator BAUCUS. That is correct.

Judge O'CONNOR. In that regard I think we have to develop a little experience before we can say that it is appropriate to go off in a certain area.

It is conceivable to me that in some areas they are so completely specialized that it is not totally inappropriate to at least consider it—conceivably in the tax or patent area, for example—but do we need ultimately some avenue back into the general court system for some final review from that specialized first treatment? These are the questions that need to be evaluated, I think.

#### REDUCTION OF VIOLENT CRIME

Senator BAUCUS. As you know, this committee and the Congress have been asked by the President to take up a major crime package. On that agenda are many items including the death penalty, sentencing reform, bail reform, preventive detention, elimination of the exclusionary rule, and a massive program to build more prisons.

Based upon your experience as a jurist, a legislator, a mother, or as a citizen, tell us how you think we should go about addressing the problem of violent crime. In which of these areas do you think we should spend most of our time and attention?

How much do you think we should devote resources to rehabilitation? Or is that passé? Should we spend time on enacting tougher longer sentences?

I am just curious as to what your general philosophy is toward violent crime and how we reduce violent crime.

Judge O'CONNOR. Senator Baucus, I wish I had a ready and an easy answer, because I think the problem is of enormous significance to us as a people and as a nation. I think it is of grave concern to our citizens, and certainly it is to me.

My experience with the criminal justice system has resulted in some disappointments in the lack of effectiveness; the recidivism rate is extremely high, and the crime rate generally is extremely high. We have to ask why.

It is a question that I have asked myself many times, and I think it is partially a result and factor of a general breakdown, if you will, of the standards that we apply in our society to moral behavior. I truly believe that.

Whether there is some legislative remedy to that I question. It is a matter that has to concern every one of us, and we have to attempt in every way we can to set standards that will discourage criminal behavior.

It seems to me that we are a mobile society, we are no longer a rural society, and we live big cities, our neighbors do not know us, and we do not know our neighbors. We do not have extended families living together, and so the pressure that comes from peer pressure, if you will, to behave in certain acceptable ways no longer exists for most people in our Nation. I think these things contribute, frankly, to the crime problem.

I also believe that our ready access, at least in the Southwest, to the drug traffic has contributed heavily to the crime problem in those Western States. It has been a very serious matter, and if there were some way to spend a little more effort and control in

the problem of traffic in heavy narcotic drugs I think it would be time and effort well spent.

If there is a way to provide more prison space, it is evident that there is a great need for that at both the State and the Federal level. We simply have more population, we have high crime rates, we have people who are being sentenced, and there is no space for them.

In Arizona, for example, we have a State prison sentence that the legislature has devised as a sentencing structure that was intended to be very specific for the judges. Certain crimes would have certain fixed sentences imposed.

We are so short of prison space in Arizona that a 5-year sentence that is imposed by the judge might result in a release within 3 months because there is no room at the prison. That kind of system is not effective.

So there are many means, and I think we need to approach them on a broad front. I wish I had some easy answers, but I do not think I do.

Senator BAUCUS. Frankly, I commend you on your answer because I think it is very complex and there is no simple solution. For example, I think that the building of prisons or lengthening of sentences alone is not the answer. It is a very complicated problem.

It reminds me of something that H. L. Mencken once said, "For every complicated problem there is a simple solution, and it's usually wrong." We have to exercise every effort at our command to try to resolve it, but it is going to be a complicated and a very difficult effort.

As a westerner I know you are very aware of some of the resource conflicts that are emerging in our country. The West has a lot of coal; oil and gas development is a potentially promising source of energy for our country; oil shale is developing in the West.

As I am sure you know, the Western States also are trying to protect their own resources. They have enacted severance taxes to compensate for the costs of development, including the disruptions and dislocations that might occur in those States.

As energy becomes more desired in our country, there is a greater potential for more conflict between Eastern States and Western States—the producing States in the West and the consuming States in the East.

I am curious as to how you see the tension resolving itself and the degree to which you think the 10th amendment will have any meaning as these cases arise.

The Supreme Court, as you may know, not too long ago held that Montana, for example, properly imposed a severance tax on coal that is mined in the State of Montana. The court held that the commerce clause did not prevent the State from imposing such a tax.

How do you see the Federal-State tensions moving, and what guidance would you give us in trying to help resolve that?

Judge O'CONNOR. Senator Baucus, I do not think I can give the Congress any particular guidance in that area. These are matters as far as the Congress is concerned that affect very directly the

State and Federal relationship. So these issues will be debated fully here and explored from a policy standpoint.

With regard to the 10th amendment, to the extent that the regulations I suppose are directed or the Federal statutes, if you will, are directed toward the activities of private business as opposed to the activities of the States as States, the most recent pronouncements indicate that the 10th amendment would not be considered as a bar.

So I do not know that we can look to that for guidance in the extent to which the Federal Government is properly regulating activity of private business within the States in this developing field.

Senator BAUCUS. I guess my question really is what you see in the Constitution that enables States to control the development of their own resources as opposed to provisions in the Constitution which allow the Congress to limit State control over resource development. Unfortunately my time is up, so we cannot pursue this any longer.

I want to close, though, by saying that this is probably the last time you and I are going to have to chat publicly over these matters. I think you have been an excellent witness.

There is a possibility that you may reappear later after the other witnesses. That has not been finally determined, but in all probability you will not return.

I frankly want to praise you and tell you that I think you have done very, very well. I wish we had more opportunity to discuss more substantively some of the issues that are coming before the Court.

I understand your reluctance to get into some of these matters in great detail. I agree that you should not discuss them publicly more than you have. Your restraint in addressing these questions has caused my admiration for you to increase rather than decrease.

Further, I think it is in large respect your personal views on substantive issues is less important than your competence and your integrity. You have certainly demonstrated the highest integrity and the highest competence in your testimony before us.

I just want to wish you the very best of luck. You are going to have to bear heavy responsibility on the Court. In many ways I envy you. We all send our best wishes with you. Thank you.

Judge O'CONNOR. Thank you very much, Senator Baucus.

Senator BAUCUS. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Iowa, Mr. Grassley.

Senator GRASSLEY. Judge O'Connor, since I tend to look so serious whenever I ask questions I would like to spend just a few minutes being philosophical and commenting in much the same vein as my predecessor, Senator Baucus, has just done.

This may be the last time you and I will have conversations unless, for instance, you would be nominated for Chief Justice some day and come back before the committee.

As I think about the things that I would hope for you, I have to think about the first thing you said to me when we met privately in my office. I was very relieved to have you say it and open up the conversation in that way. You said something to me like, "And